SUPREME COURT, U.S.
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No. _____

In the Supreme Court of the United States

JAMES R. LUKOWSKI AND
LESTER J. BLAUVELT,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN P. GARMISA
Counsel of Record
JAMES L. FARINA
JAMES T. FOLEY
HOEY & FARINA
542 SOUTH DEARBORN STREET
SUITE 200
CHICAGO, IL 60605
(312) 939-1212

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

Question Presented for Review

Whether the Sixth Circuit Court of Appeals misinterpreted *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), and § 51 of the Federal Employers' Liability Act, by ruling that a railroad employee – who (1) sustained physical impact in a train/pickup-truck collision, and (2) was in the zone-of-danger – "must demonstrate that his or her emotional injury results from a fear for his or her own physical safety," while in the zone of danger, *Lukowski v. CSX Transportation*, 416 F.3d 478, 483-84 (6th Cir.) (July 19, 2005), thereby insulating Railroads from liability for Post-Traumatic Stress Disorder.

Parties to the Proceedings

Petitioners James R. Lukowski ("Lukowski") and Lester J. Blauvelt ("Blauvelt") were employees of Respondent CSX Transportation, Inc. ("CSX" or "the Railroad").

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Lukowski and Blauvelt respectfully petition for a Writ of Certiorari to review the July 19, 2005, opinion of the Sixth Circuit Court of Appeals.

Opinions Below

The Sixth Circuit opinion in *Lukowski v. CSX Transportation* (App. A at 1a-14a) is reported at 416 F.3d 478 (6th Cir.) (July 19, 2005). And the District Court opinion in *Lukowski v. CSX Transportation* (App. B at 15a-21a) is reported at 332 F.Supp.2d 1065 (N.D. Ohio) (2004).

Jurisdiction

The opinion of the United States Court of Appeals was decided on July 19, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 51 of the Federal Employers' Liability Act ("F.E.L.A.") provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such

> employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

45 U.S.C. § 51.

Statement of the Case

Lukowski and Blauvelt were operating a locomotive for their employer, CSX Transportation, Inc., when their train collided with a motorist in a pickup truck who ran through an unguarded crossing. *Lukowski*, 416 F.3d at 479. The motorist was killed when the locomotive slammed into his vehicle. *Lukowski*, 416 F.3d at 479.

As a result of the collision and emergency braking, Lukowski and Blauvelt were jostled around and sustained bruises. *Lukowski*, 416 F.3d at 479; and 332 F.Supp.2d at 1067 ("On impact, both plaintiffs were bounced around. Neither was physically injured, aside from some minor bruises that did not require medical attention."). *See also R. 81; Ex. 16 [Blauvelt Deposition] at 47-48; Apx. at 410-411* (App. C at 23a-24a) ("my knee and my leg was slightly bruised"); *R. 81; Ex. 16 [Blauvelt Deposition] at 48; Apx. at 411* (App. C at 24a) (the following day, "I woke up and there was a visual bruise on the side of my knee and on the side of my leg from where it had hit the wall in the cab"); *R. 81; Ex. 16 [Blauvelt Deposition] at 47-48; Apx. at 410-411* (App. C at 23a-24a) (as a result of the impact from the collision, he

was also [illegible]led around); *R. 81; Ex. 17 [Lukowski Deposition] at 19-20, [illegible]x. at 432-433* (App. D at 26a-27a) (as a result of the collision, he was "jostled around back and forth from the impact, and then from throwing the train into emergency")). Lukowski also suffered a sore back from the impact. *R. 47; Ex. 17 [Lukowski Deposition], p. 48, App. at 102* (App. D at 27a-28a) ("I woke up the next morning, my back was a little stiff").

Blauvelt further testified about the fear of derailment that was felt on impact and during the emergency braking. *R. 81; Ex. 16 [Blauvelt Deposition] at 47; Apx. at 410* (App. C at 23a) (on impact there was "a lot of noise," and "a lot of fear").

The complaint that Lukowski and Blauvelt filed against CSX alleged that, as a result of negligence by CSX in failing to control vegetation at the crossing, they were unable to see the pickup truck, and stop their train, before the collision. *Lukowski*, 416 F.3d at 481. And Lukowski and Blauvelt testified they suffered from severe Post-Traumatic Stress Disorder as a result of this collision. *Lukowski*, 416 F.3d at 480.

On CSX's motion for summary judgment, the District Court concluded that there was sufficient evidence that *a* cause of the accident was negligence by the Railroad, and that Lukowski and Blauvelt were in the zone-of-danger. *Lukowski*, 332 F.Supp.2d at 1068. However, the District Court concluded that Petitioners were not entitled to recover under the F.E.L.A., because the Court deemed their emotional distress as having been caused by (1) what they witnessed in the aftermath of the accident (the corpse of the motorist), and (2) by feelings of guilt for not having been able to stop the train before the collision. *Lukowski*, 332 F.Supp.2d at 1068

("for purposes of this decision, I deem their claim to come within the *Gottshall* rule. Recovery on such claim depends, however, on a showing that the emotional injuries resulted from a fear for one's own safety, rather than for the safety of others.").

According to the District Court, the Supreme Court's opinion in *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) ("*Gottshall*"), meant that Lukowski and Blauvelt could only recover for fear for their own safety while they were in the zone of danger. *Lukowski*, 332 F.Supp.2d at 1068. Since the District Court allocated Lukowski and Blauvelt's emotional-distress to what they saw and felt *after* the accident, the Court ruled that they could not recover under the F.E.L.A. for Post-Traumatic Stress Disorder. *Lukowski*, 332 F.Supp.2d at 1068 ("Though the plaintiffs sustained a minor physical impact, and may have been within the zone of danger created by that collision, their resulting emotional injuries did not arise as a result of a fear of harm to themselves.").

Affirming, the Sixth Circuit Court of Appeals concluded that a railroad employee who was in the zone-of-danger of a collision, and who was jostled around and sustained bruises in the accident, can only recover for fear for his or her own safety while in the zone-of-danger. According to the Sixth Circuit:

> "Given *Gottshall*'s explicit reference to 'emotional injury caused by fear of physical injury to himself,' we hold that in order to recover damages for emotional distress under FELA, **the plaintiff must**

> **demonstrate that his or her emotional injury results from a fear for his or her own physical safety."**

Lukowski, 416 F.3d at 483-84 (emphasis added).

Reasons for Granting the Petition

The Sixth Circuit's opinion is inconsistent with and contrary to the Supreme Court's opinions in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), and *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997).

Because of lingering ambiguity in *Gottshall*, only the Supreme Court can resolve the issue presented by this case. Having created the controversy because of an ambiguous passage in *Gottshall*, the Supreme Court should resolve this dispute about whether "the plaintiff must demonstrate that his or her emotional injury results from a fear for his or her own physical safety," while in the zone of danger. *Lukowski*, 416 F.3d at 483-84.

Noting the ambiguity in *Gottshall*, the Third Circuit observed, in *Bloom v. Consol. Rail Corp.*, 41 F.3d 911, 915 n. 4 (3d Cir.1994), that *Gottshall* is "unclear" as to "whether the Court would require the plaintiff to actually fear physical injury (to himself) as a prima facie element (absent physical impact) or would just consider fear in determining damages." *Bloom*, 41 F.3d at 915 n. 4.

The Court in *Bloom* decided that the Supreme Court in *Gottshall* "appears to have adopted the damages approach (by stating that 'a worker in the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself[.]'" *Bloom*, 41 F.3d at 915 n. 4.

Yet, in *Lukowski*, the Sixth Circuit Court of Appeals concluded that Lukowski and Blauvelt had no claim for Post Traumatic Stress Disorder under the F.E.L.A., because *Gottshall* supposedly limited them to recovering for fear for their own safety while they were in the zone-of-danger. *Lukowski*, 416 F.3d at 483.

The Sixth Circuit's ruling – which is based on a recognized ambiguity in the Supreme Court's 1994 opinion – represents the product of a profound misunderstanding of *Gottshall*. Under the two-prong test of independent alternatives adopted by the Supreme Court in *Gottshall*, recovery for emotional injury in F.E.L.A. cases is limited "to those plaintiffs who sustain a **physical impact** as a result of a defendant's negligent conduct, **or** who are **placed in immediate risk of physical harm** by that conduct." *Gottshall*, 512 U.S. at 547-48 (emphasis added).

Consequently, railroad employees can sue their employers for negligent infliction of emotional distress under the F.E.L.A. when they (1) "sustain a **physical impact** as a result of a defendant's negligent conduct," **or** alternatively (2) "are placed in immediate risk of physical harm by that conduct." *Gottshall*, 512 U.S. at 547-48 (emphasis added).

Significantly, for part-one of the *Gottshall* test, this can be "physical impact (**no matter how slight**)." *Gottshall*, 512 U.S. at 547 (emphasis added). Accordingly, in deciding that a railroad employee can recover under the F.E.L.A. for negligent infliction of emotional distress, the first alternative test adopted by the Supreme Court was the traditional, majority "physical impact" standard. See *Gottshall*, 512 U.S. at 547-48.

Then, to further the F.E.L.A.'s "broad remedial goals," the Supreme Court decided to also permit recovery under the "progressive rule of liability" provided by the zone-of-danger test, for situations where the defendant's negligent conduct has not caused "physical impact" to the plaintiff. When there has been no physical impact, recovery for negligently inflicted emotional distress is permitted for plaintiffs "who are placed in immediate risk of physical harm by that conduct." *Gottshall*, 512 U.S. at 548.

So, the first rule of law which should have been applied, in determining whether Lukowski and Blauvelt presented sufficient evidence to recover under *Gottshall*, is whether, as a result of CSX's negligence, they "sustained a physical impact (**no matter how slight**)." *Gottshall*, 512 U.S. at 547. As the Third Circuit explained in *Bloom v. Consolidated Rail Corporation*, 41 F.3d 911, 916 (3d Cir. 1994):

> "Under the common law, courts applying the physical impact test developed the 'no-matter-how-slight' standard to prevent sometimes harsh results in near-miss situations. Thus, physical impact was found in some tenuous circumstances. W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS 363-64 (5th ed. 1988) ('**"Impact" has meant a slight blow**, a trifling burn or electric shock, **a trivial jolt or jar**, a forcible seating on the floor, dust in the eye, or inhalation of smoke.')[.]"

Bloom, 41 F.3d at 916 fn. 6 (emphasis added).

Accordingly, the Sixth Circuit in *Lukowski* erred in failing to recognize that, under *Gottshall*, even if Blauvelt and Lukowski only suffered a "slight blow," or a "trivial jolt,"